IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 6TH AUGUST 2007 / 15TH SRAVANA 1929

CRL.A.No. 877 of 2007()

SC.259/2006 of ADDL. SESSIONS JUDGE (ADHOC)-I, MANJERI
CP.58/2005 of JUDL.MAGISTRATE OF FIRST CLASS COURT, TIRUR

.....

APPELLANT: ACCUSED NO.3

RAFEEQ KHAN, S/O. MOHAMMED YUSEFF
C.NO. 4710
CENTRAL PRISON, KANNUR

BY ADV. K.P.HARISH[STATE BRIEF]

RESPONDENT:

STATE OF KERALA
REP: BY KALPAKANCHERI POLICE STATION

BY PUBLIC PROSECUTOR SRI. PUZHAKKARA MUHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 06/08/2007 ALONG WITH CRA NO.1365/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K. THANKAPPAN, J.

CRL.A.NOs. 877 & 1365 OF 2007

Dated this the 6th day of August, 2007.

JUDGMENT

Accused Nos.3 and 1 in S.C.No.259/2006 on the file of the Additional Sessions Court (Adhoc-I), Manjeri are the appellants in these criminal appeals. The appellants along with the three others were charged by the Sub Inspector of Police in Crime No.90/2005 of Kalpakancheri Police Station under Sections 399, 398, 307, 309 of I.P.C and also under Sections 3 and 7 (a) read with Section 25 of the Arms Act. The said crime was on the allegations that on 3.4.2005 at about 1.45 a.m all the five accused had entered into the Kadampuzha temple premises and attempted to commit robbery of valuables from the temple and when the security staffs of the temple shouted on seeing the five persons inside the temple premises, the accused fired at them and tried to cause death one of the security staffs and jumped out of the compound wall and thereby committed the said offences. Since the 4th and 5th accused were not traced out or arrested, investigation was concentrated against the allegations of A1 and A3. It was also alleged that the 6th accused made preparations for commission of the offence by aiding and

assisting others to commit such offence. It was further alleged that when A1 was found hide under the drain slab, he himself inflicted a shot injury on his forehead and thereby committed an offence under Section 309 of I.P.C. Though the investigations were started against the 6th accused, accused Nos 2, 4 and 5 were not charge sheeted, their case stands split up and they were absconding. The case against the 6th accused was also split up as he was absconding before the final charge. Hence, A1 and A3, the present appellants , alone faced trial.

2. To prove the case against the appellants, prosecution examined Pws 1 to 15 and relied on Exts.P1 to P29. MOs 1 to 55 were also produced. After closing the prosecution evidence, the appellants were questioned under Section 313 of the Code. The 1st accused denied the prosecution allegation and had stated that he is a marble worker and when he came after his work at the road of the temple, he was shot by the security people. Hence, the case was foisted against him by the police. The 3rd accused, the appellant in Crl.A.877/2007 denied the prosecution allegation and had stated that he is innocent and he is a carpenter and he was doing his carpentry work about 2-3 kms away from Kadampuzha at the house

of one Koya and when he was in the house of said Koya, a Head Constable came to him and he was taken by the police in an auto rickshaw to the police station and thereafter he was questioned and he was made an accused in the case. The 3rd accused has stated that he knows nothing about the 1st accused Sekhar. Exts.D1 to D3, contradictions and 161 statement of the witnesses were also relied on by the defence side. No other evidence has been adduced. However, after considering the entire evidence adduced by the prosecution, the trial court found both A1 and A3, the appellants herein, were guilty of the charges. A1 was found guilty under Section 307, 398,399 and also under Section 309 of I.P.C and he was convicted thereunder and sentenced to undergo R.I for a period of seven years and to pay a fine of Rs.5,000/= under Section 307 of I.P.C and R.I for five years and a fine of Rs.5,000/= under Section 398 I.P.C with default sentence of fine to undergo R.I for six months more and he was further sentenced to undergo R.I for seven years and a fine of Rs.5,000/= with default sentence of payment of fine R.I for six months under Section 399 and he was further found guilty under Section 309 of I.P.C and he was sentenced to undergo S.I for a period of one year under that section. The 3rd accused was found guilty under Section 307 and sentenced to undergo R.I for a

period of 7 years and to pay a fine of Rs.5,000/= with default sentence of payment of fine to undergo R.I for six months more and he was further found guilty under Section 398 and sentenced to undergo R.I for five years and a fine of Rs.5,000/= with default sentence of payment of fine, to undergo R.I for a further period of six months and he was further found guilty under Section 399 of I.P.C and he was sentenced to undergo R.I for 7 years and to pay a fine of Rs.5,000/= with default sentence of payment of fine to undergo R.I for six months. The above judgment of the trial court and the sentences passed against the appellants are challenged in these appeals. Since these appeals have been filed through the jail authorities, two members from the State brief panel have been appointed to argue the case for and on behalf of the appellants.

3. This Court heard the learned counsel appearing for the appellants as well as the Public Prosecutor. The counsel appearing for the appellants firstly contended that the trial court had committed a serious error in believing the prosecution case on the evidence adduced by Pws 1,3,4 and 13, who were the security staffs of the temple, as there was no independent witness to prove the prosecution case. Secondly, it is contended that the prosecution had

not proved the identity of the appellants as the persons alleged to have been trespassed into the temple premises and attempted to commit robbery. As per the prosecution case, none of the security staffs identified the 3rd accused, the appellant in Crl.A.No.877/2007 and the prosecution had not identified the finger prints of the appellants on the materials alleged to have been seized from the temple premises by any expert evidence. Thirdly, it is contended that investigation of the case has not been properly conducted as the police had not examined any of the independent witnesses to prove that the appellants along with the other accused trespassed into the temple premises or had committed any attempt of robbery as alleged by the prosecution as the incident, even according to the prosecution, was on a day light and arrest of the 3rd accused, the appellant in Crl.A.No.877/2007, was also not identified or spoken to by any independent witnesses. Lastly, it is contended that the prosecution also failed to prove that they were coming from different places other than Kadampuzha and came to kadampuzha with the intention to commit robbery as alleged by the prosecution. Before considering the contentions raised by the counsel appearing for the appellants, it is advantageous to note the prosecution case as such alleged against the appellants and the other accused. It was the

specific allegation against the appellants and the other accused that the appellants entered into the temple premises on 3.4.2005 at about 1.45 a.m accused No.6 aided other accused to commit the offences and as A1 to A5 entered near the Chuttambalam and when PW3 the security officer had seen the accused in the chuttambalam, he shouted by saying " thief thief " and immediately the accused fired two shots and escaped through the compound wall and immediately Pws 1, 2 and 4 were reached at the spot. At the early morning, the matter was informed to the Kalpakancherry Police Station and the police also came to the temple premises and when the public, security staffs and the police were searched the temple premises, it was seen that A1 was hiding under a slab of the drain of poojari's bath room and on seeing the security staffs and the other people, A1 himself shot on his forehead and caused an injury and thereafter A1 was taken out from the drain and he was taken to the hospital and examined by PW5 - the doctor and subsequently he was referred to the Medical College. It was the further case of the prosecution that as the security staffs and the police conducted search of the other accused, it was informed by the public that A3 and the other persons were seen in the house of one Koya. They were taken to the temple premises by the police in an auto rickshaw

driven by PW14. But, on the way to the temple, both A3 and the other accused jumped out of the auto rickshaw. However, on subsequent search, both A3 and the other two accused were arrested from a nearby place and brought to the police station and they were also made as accused in the case. The further case of the prosecution was that A6 made all arrangements to help or assist accused Nos 1 to 5 to commit robbery inside the temple by bringing them in a motor bike owned by him. With the above prosecution allegations, investigation continued and final charge has been filed. To prove the case against the appellants, prosecution relied on the evidence of Pws 1,3,4,13,14 and 15 out of whom PW15 is the Circle Inspector of Police, who investigated the case and filed the charge. Apart from the above witnesses, Pws 10 and 11 the two other police officials, who registered the crime, had given information regarding commission of the crime and they were also examined before the court. Before the trial court, PW1- the security staff of the Kadampuzha temple during the relevant time, had stated about the system of security work being conducted by the security staffs at the temple premises and had narrated the terms of work and also given a picture of the temple premises regarding security gate of the temple. This witness has further stated that at the night of 3.4.2005

he heard a sound of falling some iron rodes at the chuttambalam and on hearing that sound, both Pws 2 and 4, who were also present in the temple premises went to the Chuttambalam and they had seen five persons inside the chuttambalam and this witness has further stated that he alerted and alarmed that there was thief inside the temple. Immediately, he had seen that five persons were on the northern side of the compound wall and on hearing the shouting, they fired twice and thereafter while searching they have seen some chappals and shoes near the drain and thereafter he had seen a person under the slab of the drain near the bath room. Immediately he informed the police and he went to the police station and had given Ext.P1 statement. Thereafter the Circle Inspector of police, Valanchery came to the spot and he heard the sound of a bullet shot inside the slab. The person found inside the slab was taken out and he was having an injury on his forehead. This witness has further stated that the security staffs and the public made a search for the other accused, who entered in the temple premises and later the matter was informed the temple trustee and the other police officials. This witness though was cross examined at length and even suggested to him that he was not a witness to the occurrence but, his evidence is not shattered and he denied the

suggestion put to him. The trial court found that the evidence of PW1 was seen corroborated with the evidence of PW3. PW3 is one of the other security staffs who was on duty in the night of the incident. PW3 the trustee, who had given evidence in support of PW1 that there was an attempt to commit robbery inside the temple and after having the temple to commit robbery inside the temple. This witness has further stated that the accused were arrested on the same day by the police with the help of the public. The evidence of PW1 was seen corroborated by the evidence of PW13, who was also a security staff and had given evidence before the court that he was doing security duty at the strong room portion and when he was engaged in the duty, he heard the sound of PW1. He also supported the evidence of PW1 that he heard the sound and he had seen that five persons were standing on the northern side of the temple and PW1 had shouted by saying thief thief. At that time the persons engaged in temple premises fired two times and he had seen the accused were going out of the temple. Subsequently he had seen a person under the slab of the drain and he was taken out and identified before the court that the person taken from the drain was A1. He also said that A1 was taken to the hospital by the police. This witness has also stated that the police had recovered certain

materials like MOs 21 to 25, i.e., iron bar iron chistle, screw driver, another chistle and also a steel knife. This witness has also stated that three other persons were also arrested by the police. The public and he identified the third accused, the appellant in Crl.A.No.877/2007, as one of the persons who entered in the temple premises. The evidence of Pws 1, 3,4 and 13 had been considered by the trial court to identify the appellants as the persons who entered in the temple premises on the day of the incident. The criticism now levelled against these witnesses regarding the identity of the appellants was that there was no identification parade conducted by the police to identify the appellants as the persons entered in the temple premises as alleged by the prosecution. In this context, evidence of PW5 – doctor, who examined the 1st accused/the appellant in CrlA.No.1365/2007, had stated before the court that on 3.4.2005 he had conducted an operation on A1 and recovered a bullet from him. That bullet was collected in a cord board box and sealed the same. This witness has further stated that he can identify the said person as A1 on whom he conducted the surgery. This witness has also identified A1 as the person on whom he had conducted surgery and taken out the bullet. This witness was also cross examined by the defence. In his cross examination, the doctor

had admitted that he did not remember the character and dimension of the injures and he was also not remembering whether the police had shown any weapon to him. In the cross examination, the doctor also had stated that he cannot say whether the injury was from a short range or long range bullet. From these answers alone, this Court cannot reject the evidence of PW5 to identify the person on whom he conducted operation was A1. The bullet alleged to have been recovered from the body of the 1st accused was not sent for any expert opinion. The evidence of Pws 1, 3, 4 and 5 and the evidence of PW15 - the Circle Inspector of police would clearly show that the 1st accused and the 3rd accused were the persons who attempted to commit robbery inside the temple,. Hence, non-conduct of the identification parade would not affect the prosecution case to prove the identity of A1. With regard to the other evidence adduced by the prosecution, the trial court relied on the evidence of Pws 13 and 14 also. The evidence of PW13 would also show that he had seen the five persons inside the Chuttambalam and A3 as one among the five persons who were seen in the temple in the night. Even though PW13 has not spoken this identity in his chief examination, the witnesses had identified A3 as one of the persons who entered in the temple when he was cross examined. The identity of A3 was again

spoken to by PW14 an auto rickshaw driver. According to PW14, when he went near the house of one Koya, he had seen that the people of the locality were at the house of Koya and from the house of said Koya, the 3rd accused and another man were carried in his auto rickshaw and taken them to the Kadampuzha side and a person inside the auto rickshaw had pointed a gun on his back and he stopped the auto rickshaw. The 3rd accused and other person jumped out of his auto rickshaw and they escaped. But this witness has stated before the court that subsequently general public of the locality and the police were went in search of the persons who jumped out of his auto rickshaw and the police had seen the two persons who jumped out the auto rickshaw. This witness has identified A3, the appellant in Crl.A.877/07 as one among the persons who where arrested by the police. This witness has also stated before the court that he remembers the name of the appellant as Rafeeque Khan. This witness has further stated that he witnessed seizure of certain material objects including pistol and some other objects as per Ext.P10 mahazar in which some other objects were taken into custody by the police and the other accused when arrested by the police. This witness was also cross examined by the defence. The evidence of this witness was seen corroborated

by the evidence of PW-15 the Circle Inspector of Police. Even though it is criticised by the counsel appearing for the appellants that the police had not examined any of the independent witnesses regarding arrest of A3, it has come out in evidence that there were so many public present at the locality to watch the arrest of A3. However there is no reason to disbelieve the evidence of Pws 14 and 15 as the 3rd accused was arrested as spoken to by the prosecution. The trial court had considered the evidence of these witnesses with proper perspective and found that the prosecution succeeded in proving that both the appellants were involved in the attempt to commit robbery at the Kadampuzha temple premises on 3.4.2005. The trial court also relied on the evidence of PW15 the Circle Inspector of Police, who investigated the crime and arrested the appellants and some of the other accused. The question remains to be answered is that whether the the prosecution witnesses identified the appellants as the persons found at the temple premises at the time as alleged by the prosecution. This Court is of the view that the trial court was justified in finding that the prosecution proved the case against the appellant beyond reasonable doubt. The evidence of Pws 10 and 11 the police officers would also show that crime was registered on the basis of the statement given by PW1 and the investigation was

conducted as per the final charge filed before the court. With the above evidence and the findings entered by the trial court, this Court has to find out what are the actual offences committed by the appellant in the line of the contentions raised by the counsel appearing for the appellants. The evidence of Pws 1, 3, 4 and 13 would show that the appellants along with other accused namely accused Nos 1 to 5 trespassed into the temple premises at 1.45 a.m on 3.4.2005 and on seeing the accused inside the chuttambalam, PW1 shouted by saying thief thief and immediately the accused fired two times. PW1 and another security staff heard the sound of firing. Hearing the sound of firing by itself cannot be taken as a basis for holding that the accused including the appellants fired at any of the security staffs but, at the same time it could be sen that the accused might have fired to create an alarm or to frighten the security staffs so as to escape from the spot. If so, it is not possible to hold that the accused including the appellants committed an offence punishable under 307 of I.P.C. There is evidence to show that the appellants and the other accused trespassed into the temple premises with all preparations to commit dacoity. If so, the only fact that the security staffs heard the sound of firing by itself is not enough to hold that the appellants have committed any offence punishable under

Section 307 of the I.P.C. Hence, on this reasoning, the finding of the trial court that the appellants have committed the offence punishable under Section 307 is set aside and the conviction entered against the appellants under that section is not sustainable and the appellants are acquitted of the above offence. The trial court found that the appellants and the other accused had trespassed or entered into the temple premises and attempted to commit dacoity. If so, the prosecution is succeeded in proving that the appellants have committed the offences punishable under Section 398 of I.P.C. No doubt the evidence of the witnesses would show that the appellants along with the other accused created a panic at the temple premises. That may be to divert the attention of the security staffs and to commit dacoity in the temple and due to the intervention of the security staffs, they could not complete the offences. If so, entering of the temple premises and firing at the premises of the temple with deadly weapons like MOs 21 to 24 and pistols would show that the appellants and the other accused entered in the temple premises with a view to commit decoity. In the above circumstances, findings entered by the trial court that the appellants have committed the offence punishable under Section 398 and 399 require no interference by this Court. The sentences awarded against the

appellants under that section are also to be confirmed. The next question to be answered in this appeal is with regard to the offence alleged against the first accused. The counsel appearing for the appellants submitted that there is no acceptable legal evidence to say that the injury found on the body of the 1st accused as self inflicted. In this context, the counsel relied on the evidence of Pw5 that the injury found on the body of A1 was from a short range or long range bullet. That by itself is not a reason to discard the evidence of PW5. Further contention of the learned counsel appearing for the appellants is that as per Ext.P29 report hand wash taken from the pistol was not sent for chemical analysis and that by itself is not a reason to reject the evidence of prosecution case. The case set up by the 1st accused before the court when he was questioned under section 313 was that he was shot by the security staffs. But there is no circumstance to hold that the case set up by the 1st accused is probable and there is no circumstance to hold that the injury found on the body of A1 is not self inflicted. In the same line the case of 3rd accused is not probable.

In the above circumstances, this Court is of the view that the finding of the trial court that the 1st accused the appellant in

Crl.A.No.13652007 is liable to be punished under Section 309 requires no interference. Accordingly, conviction and sentence ordered against the appellants under Sections 398 and 399 are confirmed and the conviction and sentence ordered under Section 307 are set aside and the appellants are acquitted of the above charges. Accordingly, the appeals are allowed in part.

K. THANKAPPAN, JUDGE.

cl

K. THANKAPPAN, J.

CRL.A.NOS.877 & 1365/2007

JUDGMENT

6th August, 2007.